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Supreme Court of the United States

OCTOBER TERM, 1970

Statement not printed ____ Motion to dismiss or affirm not printed

No. 5714

LINDA JENNESS, et al.,

Appellants,

v.

BEN W. FORTSON, JR., Secretary of State of the State of Georgia,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

APPELLANTS' BRIEF

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APPELLANTS' BRIEF

OPINION BELOW

The opinion below has been reported *sub nom., Georgia Socialist Workers Party v. Fortson,* 315 F.Supp. 1035 (N.D. Ga. 1970).

JURISDICTION

This is an action for injunctive and declaratory relief in which jurisdiction of the district court was invoked under 28 U.S.C., §§ 1331, 1343 (3) and (4), 2201; 42 U.S.C., §§ 1971, 1981, and 1983; and the First and Fourteenth Amendments.

The complaint sought, *inter alia,* to enjoin enforcement and operation of Georgia's statutory scheme requiring non-party candidates for public office to obtain the signatures of five percent of the number of voters registered at the time the office was last contested before their names could appear on the ballot. A statutory three-judge court was convened pursuant to 28 U.S.C., § 2281, 2284 (A. 20).

The three-judge court determined that it was properly convened but held "[T]he prayers of the plaintiffs' petition respecting the signature requirements are denied" (A. 106). The order denying injunctive relief was entered on June 22, 1970 (A. 98). Timely notice of appeal to this Court was filed in the court below on July 22, 1970. On October 26, 1970, this Court noted probable jurisdiction (A. 110). Jurisdiction of this Court is invoked pursuant to 28 U.S.C., § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This action involves the constitutionality of a portion of the Georgia Election Code, Ga. Code Ann. § 34-1010, which is set forth in an appendix *infra* pp. la ff. The entire 1970 amendment to the Georgia Election Code is contained in the Appendix at A. 28-65.

This action also involves the First and Fourteenth Amendments to the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the provision of the Georgia election code requiring that a non-party candidate for office secure the signatures of a certain number of voters before his name may appear on the ballot violates the First Amendment rights of freedom of speech and association of such candidate and those who support him.

2. Whether the provision of the Georgia election code requiring that a non-party candidate for office secure the signatures of five percent of the voters registered at the time the office was last offered for election before his name may appear on the ballot violates the Fourteenth Amendment right to equal protection of such candidate and those who support him.

STATEMENT

A. Initiation of This Litigation.

On February 18, 1970, the Georgia Socialist Workers Party (GSWP), Linda Jenness, its candidate for Governor of the State of Georgia, Joseph Frederick Cole and Francis P. Grinnon, its candidates for Congressmen in Georgia's Fourth and Fifth Congressional Districts, and Clifford D. Conner and Jim Gwin, registered voters in the Fourth and Fifth Congressional Districts, desirous of voting for and associating with GSWP candidates, brought this action against the Secretary of State of Georgia. The complaint alleged that appellants, and others similarly situated,[1] were denied rights guaranteed by the federal Constitution by the operation of

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[1]The complaint states that it is a class action under Rule 23(a) and (b)(2), F.R.C.P., by plaintiffs Conner and Gwin on behalf of all other registered voters in the State of Georgia desirous of having an opportunity to consider persons on the ballot other than nominees of the Democratic and Republican parties (Complaint, para. 6(b)) (A. 6-7).

Georgia's statutory provisions providing for nominating petitions as the sole means for non-party candidates for office to have their names placed on the ballot.

Appellee, after seeking and receiving an extension of time, answered by stating that the Georgia Election Code had been reenacted on March 20, 1970 (A. 24, 28 ff.). Appellants amended their complaint to attack the nominating petition provision of the new election code, Ga. Code Ann., § 34-1010 (A. 66).[2]

Appellants contended, *inter alia,* that: (1) they lacked the necessary financial, physical and personnel resources to obtain the number of signatures needed within the time allowed (complaint, para. 14); (2) the number of signatures required is so burdensome and oppressive as to be an invidious distinction between members of political parties and members of other political organizations,[3] and as such, it violates the equal protection clause of the Fourteenth Amendment (Complaint, para. 15); (3) the signature gathering provision is an impermissibly heavy burden upon the rights of speech, petition, and association of the GSWP, its candidates and members (Complaint, para. 15); and (4) the signature gathering provision violates First and Fourteenth Amendment rights of persons who desire to vote for the GSWP or its candidates or who desire to consider the GSWP and its candidates as alternatives on the ballot (Complaint, para. 15) (A. 10-11).

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[2]The nominating petition provisions of the Georgia Election Code remained unchanged from the old law to the new. The fee necessary for candidates to file with appellee was changed from "reasonable" to five percent of the annual salary of the office sought. The new fee law fell to appellants' challenge (A. 108).

[3]Under Georgia law, a political party is a group whose candidate received twenty percent of the vote at the previous gubernatorial election or had its candidate receive twenty percent of the votes cast in the previous Presidential election. Other affiliations of electors are called "political bodies." Ga. Code Ann. § 34-103(s)-(u).

The complaint sought injunctive and declaratory relief as to the offending provision of state law, Ga. Code Ann., § 34-1010; and asked that appellee be enjoined and restrained from refusing to place the names of appellants Jenness, Cole and Grinnon on the ballot even though they did not submit nominating petitions accompanied by signatures of five percent of voters registered for the previous election in the area over which their candidacies extend (A. 13-14). Because appellants sought injunctive relief restraining the enforcement of a statute of state-wide appliation, a three-judge court was empanelled (A. 20).

B. District Court Proceedings.

After selection of the three-judge court, appellants moved for summary judgment accompanying their motion by brief and proposed findings of fact and conclusions of law, required by local rules, and affidavits of appellants Jenness and Cole, attesting to their candidacies for Governor and Congressman, and lack of finances, respectively, and of Douglas Jenness, State Chairman of the GSWP, attesting to the GSWP's lack of finances (A. 71-76). At the invitation of the lower court, the parties entered into a stipulation of facts (A. 87). Hearing was held before the three-judge court on May 12, 1970, with no further evidence being taken.

Thereafter, the district court entered an order extending the deadline for appellants Jenness, Cole and Grinnon to qualify for their offices from June 10, 1970 to June 22, 1970 (A. 96). On June 22, 1970, the district court entered its order upholding the validity of Ga. Code Ann., § 34-1010, although granting relief against Georgia's qualification fee statute (A. 98 ff.).

The facts, as noted by the district court are not disputed and are as follows:

> Plaintiff Georgia Socialist Workers Party (hereinafter GSWP) is a "political organization" within the meaning of Ga. Code Ann., § 34-103(t). Plaintiff

Linda Jenness is a member of GSWP and desires to be a candidate for governor of Georgia. Plaintiffs Cole and Grinnon are GSWP members and desire to be candidates for Congress for the Fourth and Fifth Congressional Districts, respectively. Plaintiffs Conner and Gwin are voters in the Fourth and Fifth Districts, respectively. They desire to represent, as a class, all registered Georgia voters who desire to consider persons on the Georgia general election ballot other than Democratic or Republican nominees. Defendant is the Georgia Secretary of State.
* * * *

Under the current Georgia law a "political party" is a political organization having candidates or electors who received 20% of the votes cast at the preceding gubernatorial or presidential election. Ga. Code Ann., § 34-103(u). A "political body" is a political organization which, like GSWP, did not maintain candidates for governor or presidential elector who received 20% of the vote in the preceding gubernatorial or presidential election. Ga. Code Ann., § 34-103(s). While political parties may nominate candidates through primaries without submitting nominating petitions, nominees of "political bodies" and independent candidates must file nominating petitions to obtain ballot space. Ga. Code Ann. § 34-1001. These nominating petitions must include the names "of not less than five percent of the total number of electors eligible to vote in the last election for the filling of the office the candidate is seeking . . ." Ga. Code Ann. § 34-1010(b). The total time allowed for circulating nominating petitions is 180 days (Ga. Code Ann. § 34-1010(e)); and the petitions must be filed by 12:00 noon on the second Wednesday in June. Ga. Code Ann. § 34-1002(b). Plaintiffs allege the petition requirements above create an invidious distinction between party members and non-party members and therefore violate plaintiffs' Fourteenth Amendment rights to equal protection of the law. Furthermore, plaintiffs allege the petition requirements unconstitutionally

burden their First Amendment rights to freedom of speech, petition and association as well as their "right to vote." (A. 98-99).

The district court found that the candidate-plaintiffs and the GSWP[4] had standing to challenge the nomination petition requirements. It questioned the standing of the voter-plaintiffs to challenge the nomination petition requirements but did not reach the issue since the standing of the others was clear and the voters sought no relief not requested by the candidates and GSWP (A. 100-101).

The district court regarded appellants' challenge to the nominating petition requirements as based upon the equal protection of laws clause of the Fourteenth Amendment (A. 101). In rejecting appellants' claim, the court below read this Court's prior decision in the area, *Williams v. Rhodes*, 393 U.S. 23 (1968), as turning upon the *totality* of Ohio's restrictive laws:

> It takes no more than a glance at these [Ohio's] combined requirements to see that the Court, in *Williams*, was confronted with much more than a single statute requiring the signatures of 5% of the voters on a nominating petition. Moreover, the Court in *Williams* did not strike down even a 15% requirement as such. Indeed, the Court was very careful to make it clear that it did not do so, and it appears that only Mr. Justice Harlan thought it was exorbitant. As previously stated, what the Court did strike down in *Williams* was the *combination* of restrictions, considering their total effect. This appears from every opinion in the case, majority, concurring, and dissenting (A. 103).

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[4] The jurisdictional statement *in forma pauperis* was originally filed in the names of the GSWP and appellants Jenness, Cole, Grinnon, and Conner with supporting affidavits. The Office of the Clerk informed counsel that the GSWP was not a proper party to proceed *in forma pauperis;* and, submitted the jurisdictional statement to the Court in the names of Jenness *et al.*

The court below therefore declined to say as a matter of law that Georgia's nominating requirement is either unreasonable or that it constituted invidious, intentional, or purposeful discrimination (A. 106). Appellants' prayers for relief with respect to Ga. Code Ann., § 34-1010 were denied and they were given until September 1, 1970, to file notices of candidacy accompanied by nominating petitions with appellee Secretary of State (A. 108).

C. Proceedings Subsequent to Order of the District Court.

Appellants filed a motion for injunction or other relief pending appeal with Mr. Justice Black on or about August 13, 1970, when they filed their jurisdictional statement. That motion was denied on August 25, 1970. A motion to advance was denied on October 26, 1970 when probable jurisdiction was noted.

Appellants did not file nominating petitions with appellee on September 1, 1970.[5] In the Republican gubernatorial primary election, held on September 9, 1970, Hal Suit was the winner with 62,868 votes out of a total of 107,557 cast.

In the November 3, 1970, general election only the nominees of the Democratic and Republican parties appeared on the ballot for state-wide and Congressional offices. A total of 1,045,402 votes were cast for Governor in the general

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[5] As stated to this Court on August 13, 1970,

> Appellants cannot, in candor, meet that [nominating petition] requirement. They do not have the money (as seen by the inability of the candidates to put up $2,125.00 for each office they sought, or of the GSWP to advance that sum for even one office) to pay canvassers or the expense of canvassing. Nor, do they have the membership to either seek out from others or obtain within their own ranks such a number of signatures. Their membership does not exceed the 108 attributed to the Socialist Labor Party in Ohio, *Williams v. Rhodes, supra,* 393 U.S. at 28 (Appellants' Jurisdictional Statement at 5-6).

election;[6] and, a total of at least 1,960,436 voters were registered and eligible to vote in the election.[7]

ARGUMENT

I.

THE NOMINATING PETITION REQUIREMENTS OF THE GEORGIA ELECTION CODE VIOLATE THE FIRST AMENDMENT RIGHTS OF THE APPELLANTS AND OTHER PERSONS WHO DESIRE AN ALTERNATIVE TO THE MAJOR POLITICAL PARTIES.

In *Williams v. Rhodes*, 393 U.S. 23 (1968), this Court held that state laws restricting access to the ballot infringe upon the protected liberties of the First Amendment:

> "In the present situation the state laws place burdens on two different, although overlapping kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment . . .
>
> "The right to form a party for the advancement of political goals means little if a party can be kept off the election ballots and thus denied an equal opportunity to win votes." *Williams v. Rhodes, supra*, 393 U.S. at 30-31.

Indeed, the Court has recognized the need to protect the freedom of association in circumstances where the state

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[6] Jimmy Carter (Democrat), 620,419; Hal Suit (Republican), 424,983.

[7] According to the office of the Secretary of State (appellee), from which all of the above figures were obtained, there were 1,960,436 registered voters for the 1968 general election. No total is yet available as to this year's total registered votes.

impingement upon the associational activities is at a remove from the direct purposes of the group. Cf. *United Mine Workers of America v. Illinois State Bar Assn.*, 389 U.S. 217 (1967) (Group legal services for union members); *NAACP v. Button*, 371 U.S. 415 (1963) (Legal services for civil rights group). But, in the instant case, restriction of entry upon the ballot strikes at the very heart of the purposes for which appellants seek to band together: they are, by the state's own definition, "an affiliation of electors organized for the purpose of influencing or controlling the policies and conduct of public office through the nomination of candidates for office and, if possible, the election of them." Ga. Code Ann. § 34-103(t). Or, as plaintiff GSWP expressed it below, it "is an unincorporated association of persons devoted to the ideals of socialism through *participatory democracy*. The purpose of the Party shall be to educate and organize the working class for the abolition of capitalism and the establishment of a worker's Government to achieve socialism" (Complaint, para. 3) (A. 5). (Emphasis added).

Of course, the fact that the ideas which appellants have banded together to espouse and urge upon the electorate may be minority or unpopular does nothing to limit the impact of the First Amendment upon them. *Carrington v. Rash*, 380 U.S. 89 (1965). The protection of unpopular ideas is at the very heart of the First Amendment. *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949); *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *Stromberg v. California*, 283 U.S. 359, 369 (1931). The virtue and importance of minority parties has been recognized by the Court. *Sweezy v. New Hampshire*, 354 U.S. 234, 251 (1953).

The ways in which the challenged statute impinges upon the First Amendment rights of appellants are at least two. The first may be seen from the fact that the statute effectively prevents appellants and others whose ideas fail to capture a substantial mass of the electorate from appearing on the ballot at all. In terms of the legitimacy of political

function, appellants are prevented from appearing before the persons they wish to influence at the point most crucial to them: the printed ballot. Without appearing on the ballot, appellants can have no hope of expressing the legitimacy of the political ideas which they espouse; without appearing on the ballot, appellants cannot hope to impress upon the electorate that the ideas they espouse are part of the currency used in the political marketplace.

To say that failure to actually appear on the ballot is no bar to legitimate aspirations (for the write-in has long been allowed in Georgia) is to ignore the Court's teachings in *Williams v. Rhodes, supra.* Cf. *Socialist Labor Party v. Rhodes,* 290 F.Supp. 983, 992-3 (S.D. Ohio 1968) *rev'd, sub nom., Williams v. Rhodes, supra.* (Relief below was limited to requiring state to provide write-in space). Unless a party can have its candidates appear on the ballot, it is unable, figuratively speaking, to say to the electorate, "This is what we stand for, and, when you go into the voting booth, you will be able to choose to support us or not." It is a far cry, in terms of political expression, from merely being able to say, "This is what we stand for, and, when you go into the voting booth, you will be able to choose to support us if you write in the names of our candidates, or, if not, you may vote for any of the candidates whose names appear on the printed ballot in front of you."[8]

The second way the challenged statute impinges upon the First Amendment is in terms of freedom of association. Cutting through the question of the right to appear on the ballot is the First Amendment right of freedom of association. By limiting access to the ballot to those who are either the nominees of the established political parties, cur-

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[8]Or, as phrased by Judge Kinneary, dissenting, in *Socialist Labor Party v. Rhodes, supra:* "This Court should not relegate the thousands of people in this group to the status of second class electors by saying to them; 'Your choice may be written in, but your choice may not be on the ballot.' This is not equal opportunity." 290 F.Supp. at 998.

rently popular individuals, or espousers of a currently popular stance, the state has effectively impaired the freedom of association of those who would espouse ideas that are of necessity minority views.[9] By saying to small groups, "Thou shalt not be seen upon the ballot," the state has discouraged the persons who would support the ideas of appellants from either associating with them or from participating in their attempts to express their views and grievances. Cf. Chafee, *Free Speech in the United States* (1941) at 490-493 ("Excluding Communists from the Ballot"). The Court has long recognized that the First Amendment and the need for judicial protection of those whose activities fall under it go beyond relief from criminal prosecution Cf. *DeJonge v. Oregon*, 299 U.S. 353 (1937); *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449 (1958); *Shelton v. Tucker*, 364 U.S. 479 (1960).

In First Amendment terms, the requirement that a candidate for governor gather 88,175 signatures as a prerequisite to his appearance upon the ballot acts in the nature of a prior restraint upon his ability and the abilities of those who would associate with him—to say nothing of those deterred from such association by recognition of its futility—to express political views. Such restraint is contrary to our tradition of robust and open political discussion. *Bond v. Floyd*, 385 U.S. 116 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).[10]

The simple nature of Georgia's restriction to entry upon the ballot does nothing to limit its effectiveness. Cf.

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[9]The career of the late Norman Thomas, frequent Socialist nominee for President, shows that minority views need not always be ignored; they may well be adopted by the electorate or its representatives after a change in time and circumstance.

[10]More direct suppression of the unpopular, as *Bond v. Floyd*, *supra*, has a long Georgia history. *Wood v. Georgia*, 370 U.S. 375 (1962); *Herndon v. Lowry*, 301 U.S. 242 (1937); *Wright v. Georgia*, 373 U.S. 284 (1963) Cf. *Carmichael v. Allen*, 267 F.Supp. 985 (N.D. Ga. 1965) (three-judge court).

Harman v. Forssenius, 380 U.S. 528 (1965); *Carrington v. Rash, supra*. It is an absolute bar to those who cannot meet its requirements. There are no alternative solutions for the non-party candidate: he can only make his way onto the ballot if he is able to compile the requisite number of signatures.[11]

The result is that there is a restriction on the right to vote freely for the candidate of one's choice—and that choice is the essence of our democratic society. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964). It is, of course, a restriction that takes place both before and at the polling place. Not only does it restrict the choices printed on the ballot before the voter; the necessary concommitant function of the state's restrictive requirement must be to limit the number of persons who attempt to present themselves to the electorate as possibilities.[12]

In First Amendment terms, a Georgia candidate for governor will never be able to express his ideas to the electorate unless he has been able to meet the considerable burden of gathering over eighty-thousand signatures. This means that the political dialogue is perforce limited to those who (a) are able to amass the funds and manpower to collect such signatures, or, (b) those whose views are compatible with the two majority parties in the state. Left out of

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[11] An additional First Amendment problem, to say nothing of equal protection, arises when one considers the actual signature requirement. It requires the signatory to identify himself, to subject himself to possible subpoena if his identity is questioned (Ga. Code Ann., § 34-1011(b)), and to expose himself in a manner which contrasts with the traditional secret ballot. The "chilling effect" of such public endorsement and identification with potentially unpopular views is obvious. Cf. *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Bates v. City of Little Rock*, 361 U.S. 516 (1960).

[12] Appellants do not seek for all or more persons to become candidates; rather, their interest is in ensuring that access to the ballot is not limited by state-imposed bars upon political expression.

the political dialogue—voiceless in terms of the ballot—are those whose views do not command support.[13]

Were the State to condition the right to speak or petition upon satisfaction of such a signature barrier, no court would hesitate to strike down the First Amendment violation. The Court has already stricken prosecutions of First Amendment activity arising out of the failure of the speaker or marcher to satisfy the demands of the onlooker, *Terminello v. City of Chicago*, 337 U.S. 1 (1949); *Gregory v. City of Chicago*, 394 U.S. 111 (1969), the demands of fellow legislators, *Bond v. Floyd, supra*, the demands of the judiciary, *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Wood v. Georgia, supra*, and the demands of police-censors, *Cox v. Louisiana*, 379 U.S. 536 (1965).

Indeed, in the prior restraint cases, the Court has applied, as the proper constitutional test for justifying a restriction of First Amendment rights, the "clear and present danger" test. See, e.g., *Thomas v. Collins, supra*, where the Court reversed a union organizer's conviction under a state statute requiring prior registration, saying:

> "That priority [the First Amendment] gives these liberties a sanctity and a sanction not permitting dubious intrustions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. [citing]
>
> "For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger." 323 U.S. at 530.

In the context of elective politics, there is no danger of any sort arising from one's appearance on the ballot. But,

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[13]The courts have not allowed the right to education (*Meredith v. Fair*, 298 F.2d 696 (5th Cir. 1962) *cert. den.* 371 U.S. 828) or entry into business (*Cypress v. Newport News General & Non-sectarian Hosp. Assn.*, 375 F.2d 648 (4th Cir. 1967) (*en banc*)) to be conditioned upon popular support. Political candidacy enjoys at least such constitutional primacy. *United Public Workers of America (CIO) v. Mitchell*, 330 U.S. 75 (1946).

that ballot is the market place for elective ideas; it is the arena in which one must appear to retail one's views and party brand-name. Without being able to appear on the ballot, one can only participate in the political dialogue with a muffled voice. The chance of making one's views known—which is not to say, to prevail in the advocacy thereof—has been significantly impaired by the state's restrictive conditions to entry on the ballot.

II.

THE NOMINATING PETITION REQUIREMENTS OF THE GEORGIA ELECTION CODE VIOLATE THE RIGHTS OF APPELLANTS TO EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT VIS-A-VIS CANDIDATES OF ESTABLISHED POLITICAL PARTIES

In *Williams v. Rhodes, supra,* the Court, having determined that First Amendment rights were at stake in ballot attainment, proceeded to treat the claim in terms of equal protection.[14] The Court recognized First Amendment rights as being fundamental interests and as such entitled to strict equal protection.[15] See, *e.g., The Supreme Court, 1968 Term,* 83 Harv. L.R. 7, 86-97 (1969).

When the state's infringement upon attainment of the ballot is approached in equal protection terms, it requires

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[14] Although Mr. Justice Harlan, concurring, argued that the same result could have been reached under First Amendment principles through the due process clause. *Williams v. Rhodes, supra,* 393 U.S. at 41. Mr. Justice Douglas, concurring, focused directly upon the First Amendment interest at stake. *Williams v. Rhodes, supra,* 393 U.S. at 35.

[15] Other rights which have been recognized include, Voting (e.g., *Harper v. Virginia Bd. of Elections,* 383 U.S. 663 (1966); *Reynolds v. Sims,* 377 U.S. 533 (1964)), interstate travel (*Shapiro v. Thompson,* 394 U.S. 618 (1969)), procreation (*Skinner v. Oklahoma,* 316 U.S. 535 (1942), certain criminal procedures (*Griffin v. Illinois,* 351 U.S. 12 (1956)).

that the state show compelling justification for denying the right. "If the state's objective is not important enough to justify impairment of the individual's interest, the classification will fall." *Developments in the Law–Equal Protection*, 82 Harv. L.R. 1065, 1131-3 (1969). Cf. *McLaughlin v. Florida*, 379 U.S. 184 (1964).

But, the very reasons which this Court faced and rejected in *Williams v. Rhodes, supra,* are the only plausible reasons that a state might offer for restricting access to the ballot: the need to maintain the two-party system; the desirability of having the winning candidate obtain a majority vote; the need for potential officials to satisfy the requirements of a party, resulting in a choice of leadership as well as issues to voters; and, the danger of confusion from a multiplicity of names on the ballot.[16] *Williams v. Rhodes*, 393 U.S. at 31-33.

The State of Georgia has not put forward any reasons for the maintenance of its system of restrictive access to the ballot beyond those put forward by Ohio; and, indeed, it could not have. In his answer, appellee offered appellants' laches[17] as a defense (A. 23); in his brief before the court below, appellee suggested no compelling state interest but instead attempted to distinguish between the Georgia and Ohio requirements in terms of equal protection; and, the same points are the only ones made in appellee's motion to dismiss or affirm and in his brief in opposition to application for issuance of an injunction pending appeal.[18]

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[16]Multiple candidates are not an uncommon phenomenon in Georgia primaries. See, appellee's brief in opposition to application for issuance of an injunction pending appeal, at 1.

[17]The defense of laches was relegated to a footnote by the lower court (A. 106, n.3). Both the lower court and appellee ignored the startling (in terms of laches) fact that appellants filed their suit before the law presently in effect was enacted. See, motion for leave to amend complaint (A. 66).

[18]The financial interest of the state lies in permitting access to the ballot without restriction. It cost $77,000 and $81,000 to examine

There is thus no "compelling state interest in the regulation of a subject within the State's constitutional power to regulate [that] can justify limiting First Amendment freedoms" here. *NAACP v. Button, supra,* 371 U.S. 438, quoted with approval, *Williams v. Rhodes, supra,* 393 U.S. at 31. Without the existence of a legitimate state interest, it matters not that Ohio achieved its objectives through an "entangling web" while Georgia does the job with but one statute. Where constitutional rights are concerned, it is not the number of statutes necessary to achieve the end that count; rather, it is the end. *Green v. County School Board of New Kent County,* 391 U.S. 430 (1968). The Constitution forbids simple-minded as well as sophisticated modes of discrimination. Cf. *Lane v. Wilson,* 307 U.S. 268, 275 (1939).

Nor did the district court find any compelling or other justification for the state's nominating petition requirements. The opinion of the court below focuses exclusively upon the fact that in Ohio there was a complex web of statutes of which the nominating provision requirements were but a part. The gravamen of the lower court's analysis was thus that the nominating petition requirement did not, presumably, violate appellant's rights and was not susceptible of remedy: ". . . this Court simply cannot say, as a matter of law, that Georgia's 5% is either unreasonable or that it constitutes invidious, intentional, or purposeful discrimination. . ." (A. 106). The textual footnote states that "The Court is strengthened in this conclusion by the fact that in the last general election in Georgia a Republican candidate for governor not only did qualify by obtaining the necessary signatures, but in fact went on to receive a plurality of the votes cast" (A. 106 n.2).[19] Of course, in terms of the

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state-wide nominating petitions of the Republican candidate for governor in 1966 and of George Wallace for President in 1968 (A. 88-89). The contrasting cost of printing additional names on the ballot is *de minimus.*

[19]The outcome of that election was at stake in *Fortson v. Morris,* 385 U.S. 231 (1966).

law now challenged, a Republican—as a member of a party polling twenty percent of the national vote—like a Democrat, would no longer need to go the petition route. See, Ga. Code Ann., § 34-103(s).

But, appellants are being denied equal protection *vis a vis* persons who are candidates for election within the State's major political parties; as compared to those major political parties; and, as compared to the supporters and voters for those parties. It is a denial of equal protection that is directly related to appellants' exercise of their First Amendment rights, for if appellants did not have views and ideas that distinguish them from the major parties, they could offer for office within the structure of those parties.[20]

Were appellants able to offer themselves as candidates for office within a party they would automatically have their names printed on the party's primary ballot, thus bringing them squarely before a portion of the electorate. Were appellants to prevail in the primary, they would automatically have their names placed upon the ballot for the general election without regard to the number of persons who participated in the primary, or any number or percentage of votes that they received. It is not inconceivable that a primary involving the lesser of the major parties could have several winners whose vote totals were less than the percentage required for placement upon the general election ballot by signature. Indeed, the winner of the Republican gubernatorial primary this year received fewer votes than GSWP candidate Jenness would have needed signatures to appear on the general election ballot. See, p. 8, *supra*.

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[20]In Georgia as in other states, party nominees are required to take an oath that they support all party candidates. This has led one incumbent Congressman, Charles L. Weltner, to withdraw his name from nomination because he could not support Lester G. Maddox, the party's nominee for Governor. Weltner was the only Southern Congressman to vote for the 1964 Civil Rights Act, 42 U.S.C., § 2000a *et seq.*, while Maddox views on the Act are a matter of public notoriety and judicial note. *Willis v. Pickrick Restaurant*, 231 F. Supp. 396, 234 F. Supp. 179 (N.D. Ga. 1964).

But, the fact that appellant Jenness needed to get more signatures than a primary winner got votes begs the very real question of the unequal burden that is put on the non-party candidate. The party candidate runs in his primary under the auspices of the State. "All such primaries shall be conducted in each district by the poll officers, by the use of the same equipment and facilities, so far as practicable, as are used for such general elections." Ga. Code Ann., § 34-1008 (1970) (A. 40) And, the involvement of the State is financial as well:

> "The expenses of a primary shall be paid by the respective county, except that forms listed under § 34-301(e) [blank ballots, instructions, oaths] shall be furnished upon request by the Secretary of State." Ga. Code Ann. § 34-1009 (A. 40).

The State furnishes to the party candidates a polling place, officers to watch the polls, ballots, voting machines. It lends its official support to the "activity" of gathering "signatures" that the non-party candidate has to gather on his own.[21]

Were party candidates to have to go out and gather ballots on their own, to bring them to the primary polling place, making certain that only a registered voter had gathered those ballots, and making certain that no one gave them a "ballot" who had also given one to another candidate, then—and only then—would the burdens of getting on the ballot be equally distributed. Cf. Ga. Code Ann., § 34-1010(c) and (d), infra, p. 1a, 2a.

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[21] In equal protection terms, the state can thus "directly dictate or casually promote a distinction in the treatment of persons solely on the basis [of their membership in an established political party]." *Hamm v. Virginia State Board of Elections*, 230 F.Supp. 156, 157-8 (E.D. Va.), *aff'd sub nom. Tancil v. Woolls*, 379 U.S. 19 (1965). While *Hamm* was, of course, a race case the distinction between race and political association as grounds for state inequal treatment is slight. Cf. *Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932).

The situation is analogous to that recently condemned by the Seventh Circuit Court of Appeals. In *Shakman v. Cook County Democratic Organization*, ___ F.2d ___, 39 Law Week 2263 (October 23, 1970), the court of appeals reversed a lower court decision denying relief to persons claiming their rights to have been violated by city officials who required city and county patronage employees to furnish votes, campaign work, and financial contributions to the nominees of the regular Democratic party—thus placing at clear disadvantage those candidates and voters who were out of power in city and county government. The interest of candidates in official treatment free from discrimination is entitled to constitutional protection. *Snowden v. Hughes*, 321 U.S. 1 (1944). See, *White v. Snear*, 313 F.Supp. 1100, 1104 (E.D. Pa. 1970). The equal protection clause likewise secures the voter's interest in a voice in government of equal effectiveness with other voters.

While the distinction between the active assistance offered established candidates in *Shakman v. Cook County Democratic Organization, supra*, and the semi-passive assistance offered established party candidates in Georgia is a real one, it is nevertheless a distinction without a constitutional difference. Where the state is providing its official sanction and assistance to certain activities but not to others, and where those activities concern First Amendment rights, then the equal protection clause has been violated. Cf. *Socialist Workers Party v. Rockefeller*, 314 F.Supp. 984 (S.D. N.Y. 1970), *aff'd*, ____ U.S. ____, 39 Law Week 3145 (Law unconstitutional which permits newly registered voters to participate in primaries of established parties but not sign nominating petitions of others).[22]

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[22]Perhaps closer on point, New York failed to show a compelling interest in providing free lists of registered voters to parties getting over 50,000 votes in the previous gubernatorial election, ". . . for granting what, in effect, is a significant subsidy only to those parties which have least need therefor." *Socialist Workers Party v. Rockefeller, supra*, 314 F.Supp. at 995. Georgia grants a more direct subsidy: it puts certain candidates on the general election ballot without the prior showing of popularity it required of appellants.

For a party with less than one hundred members, the burden on gathering 88,175 signatures is simply insurmountable. For a party with little financial backing, the burden is doubly hard. If it cost the Secretary of State $77,000 and $88,000 to examine Republican and American Independence Party petitions in 1966 and 1968, what did it cost to gather those signatures? (A. 88-89).

Thanks to appellants' partial success in the lower court, the burden of costs upon indigent candidates has been partly alleviated. But, for those very candidates to be able, within the party structure, to campaign as they wish and have the voters come to them while the non-party candidates must go out and seek signatures mocks the idea of equal protection.

In the 1966 gubernatorial election from which the Secretary of State took his 1970 five percent figure (88,175 signatures for appellant Jenness to get on the ballot) there were a total of 1,763,500 registered voters. Of that number, only 955,770 actually cast their votes for Governor. See, *Fortson v. Morris, supra,* 385 U.S. at 236. In terms of equal protection, this means two things. First, it means that, measured by the Ohio standard, Georgia requires the signatures of 9.2 percent of the persons who actually voted.[23] If, the test is one of reasonableness, Georgia continues to be among the most stringent of the states. See, *Williams v. Rhodes, supra,* 393 U.S. at 33, n. 9; 393 U.S. at 47, n.10 (Harlan, J., concurring); Jurisdictional Statement at 30-34. Second, it means that the task of gathering 88,175 signatures is likely to be twice as burdensome as it appears on its face. If only half of the registered voters bother to vote, surely no more will be potentially interested in signing a petition in support of Socialist candidates.[24] This only

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[23] But a major party needs get only 20 percent of the votes actually *cast* in the election to keep its position on the ballot without having to gather signatures. Ga. Code Ann., § 34-103(u).

[24] As noted at p. 8, *supra,* the discrepancy between registered voters and those actually voting in the State remains as it did in

emphasizes the very real denial of equal protection: as long as the major parties appeal to a middle-of-the-road group of the electorate, they can retain their right to appear on the ballot regardless of the number of persons actually voting. But, appellants must generate a number of signatures in no way related to either a state interest or to actual turnout of voters. Upon appellants rests the burden of creating enthusiasm before they can even face the electorate.

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed and Ga. Code Ann., § 34-1010 declared unconstitutional and its application enjoined.

Respectfully submitted,

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1966- meaning that to require 5% of the registered voters' signatures is equivalent to requiring 10% of the signatures of those who actually voted.

APPENDIX

Constitutional and Statutory Provisions Involved

1. Ga. Code Ann., § 34-1010:

Nomination petitions. - (a) In addition to the party nominations made at primaries, nomination of candidates for public office may also be made by nomination petitions signed by electors and filed in the manner herein provided. Such petitions shall be in the form prescribed by the officers with whom they are filed, and no other forms than the ones so prescribed shall be used for such purposes.

(b) A nomination petition of a candidate shall be signed by a number of electors of not less than five percent of the total number of electors eligible to vote in the last election for the filing of the office the candidate is seeking; except that in the case of a candidate seeking the office of judge of the superior court or solicitor general the five percent figure shall be computed only on the total number of such electors of the judicial circuit directly involved.

(c) Each person signing a nomination petition shall declare therein that he is a duly qualified and registered elector of the State entitled to vote in the next election for the filing of the office sought by the candidate supported by the petition and shall add to his signature his residence address, giving municipality, if any, and county, with street and number, if any. No person shall sign the same petition more than once. Each petition shall support the candidacy of only a single candidate. A signature shall be stricken from the petition when the signer so requests prior to the presentation of the petition to the appropriate officer for filing, but such a request shall be disregarded if made after such presentation.

(d) A nomination petition shall be on one or more sheets of uniform size and different sheets must be used by signers resident in different counties. The upper portion of each sheet, prior to being signed by any petitioner, shall bear the name and title of the officer with whom the petition will

be filed, the name of the candidate to be supported by the petition, his profession, business or occupation, if any, his place of residence with street and number, if any, his political party or body affiliation, if he is its nominee for the office he is seeking and the name and date of the election in which the candidate is seeking election. If more than one sheet is used, they shall be bound together when offered for filing if they are intended to constitute one nomination petition, and each sheet shall be numbered consecutively, beginning with number one, at the foot of each page. Each sheet shall bear on the bottom or back thereof the affidavit of the circulator of such sheet, setting forth: (i) that the affiant is a duly qualified and registered elector of the State entitled to vote in the next election for the filing of the office sought by the candidate supported by the petition; (ii) his residence address, giving municipality with street and number, if any; (iii) that each signer manually signed his own name with full knowledge of the contents of the nomination petition; (iv) that each signature on such sheet was signed within 180 days of the last day on which such petition may be filed; and (v) that, to the best of affiant's knowledge and belief the signers are registered electors of the State qualified to sign the petition, that their respective residences are correctly stated in the petition, and that they all reside in the county named in the affidavit.

(e) No nomination petition shall be circulated prior to 180 days before the last day on which such petition may be filed, and no signature shall be counted unless it was signed within 180 days of the last day for filing the same.

(f) A nomination petition shall not be amended or supplemented after its presentation to the appropriate officer for filing.

(g) Any political party or body seeking to have the names of their candidates for the offices of presidential electors placed upon the ballot through nomination petitions shall not compile a separate petition for each candi-

date for such office, but such political party or body shall compile their petitions so that the entire slate of candidates of such party or body for such office shall be listed together on the same petition. (Acts 1964, Extra. Sess., pp. 26, 93, 1965, pp. 349, 354; 1968, p. 257; 1968, pp. 871, 877.)